The Desirability of a Statute for the Enforcement of Mediated Agreements

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A statute governing the enforcement of mediated agreements is desirable in order to encourage the use of mediation; a statute is indispensable in order to resolve questions concerning proper mediation procedure.

Professor Burns' paper is undoubtedly correct in asserting that the common law provides many standards to govern the enforceability of contracts, both non-mediated and mediated. As a general rule, the enforceability of mediated agreements should be determined by those common law principles as modified by applicable statutes such as the Uniform Commercial Code.[1] However, special procedural rules, codified by statute, are needed to increase the utility of mediated agreements.[2]

Contrary to Professor Burns' focus, the purpose of many mediated agreements is to resolve outstanding differences, rather than to govern future party relationships. Hence, some mediated agreements are ready for enforcement and are susceptible to entry as judgments. For these settlement agreements, a specific summary procedure available for the enforcement by motion, similar to the procedure available for the enforcement of arbitration awards under the Federal Arbitration Act and all state statutes, may be desirable. The availability of rapid and easy enforcement procedures in the mediation context can encourage the use of mediation as a means of settling disputes when, for example, the parties are concerned about the continued availability of assets to satisfy the settlement terms, or the parties have some misgivings about the other parties' continued willingness or ability to perform as promised. However, a party with a claim may see no advantage to a mediated settlement if the mediation procedures are subject to the usual delays inherent in litigation.

In addition, a statute which codifies the enforceability of mediated agreements would force the legal community to recognize the validity of the mediation process. Imposing a statutory process on mediation

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1. Modern arbitration statutes provide a model. They provide enforceability of agreements to arbitrate unless legal or equitable grounds exist for revocation, for example. Uniform Arbitration Act, § 1. Such provisions were urged and adopted to overcome common law doctrines permitting revocation with impunity before award. Statutory declarations of the validity and enforceability of mediated agreements are desirable for different reasons.

2. *See* Note, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. DIS. RES. 385 (1986), for examples of mediated agreement situations which present enforcement questions in which common law principles alone do not supply a complete answer. Where circumstances peculiar to mediated agreements occur, they may require specially tailored principles which statutes can most readily supply.

activities might overcome the general reluctance of lawyers to use any new approach which contains unfamiliar procedures and doctrines. Further, the enactment of a statute adds a certain dignity and respectability to the use of mediation by lawyers.

Aside from considerations of utility and convenience, mediation presents several unique ethical problems which require legislative resolution. For example, questions arise as to whether a lawyer/mediator may or should offer the parties legal advice. The solution necessary to satisfy norms of attorney responsibility is to require the mediator to refer the parties to their own counsel. While referral is the more ethical alternative, one objection to this alternative is that the financially weaker party may lack effective access to counsel and would be disadvantaged by the insistence upon such a procedure.

Some courts might well find that a mediator's action in purporting to give legal advice to both parties fatally flaws the resulting agreement. Other courts may tip the balance in favor of convenience by finding this giving of advice to be justified as a means of encouraging dispute mediation. Still others may look to the overall context, including the resources of the parties, the relationship of the attorney with either or both parties, whether the legal problem may prevent an agreement, and whether some statute or doctrine gives one party protection which an unrepresented party might not use fully or at all. The possibilities are many and varied, but most can be anticipated if the accumulated experience of mediators and lawyers specializing in these difficult areas are pooled.

The American Bar Association and others have promulgated codes of ethics to cover difficult mediation situations.[3] However, the status of these codes, which often differ concerning key provisions, is far from settled. Some courts may regard them as norms which must be observed; others may treat them as desirable but nonbinding expressions of goals. Legislation could provide the answer by making mandatory those provisions deemed desirable or modifications of those provisions.[4]

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3. *See generally, ABA Standards of Practice for Lawyer Mediators in Family Disputes,* Appendix I, ABA Divorce Mediation: Readings.

4. Other common ethical and practical problems require resolution. In community disputes, for example, the inclusion of all affected groups in the mediation process is desirable. Yet powerful groups with adverse interests may well resist their inclusion in the mediation of a dispute. That insistence may place the mediator in a dilemma as to whether to proceed despite the particular group's absence. If the mediator raises the question or declines to proceed, his or her neutrality may come into question. Insistence upon inclusion of the absent group may appear as advocacy, an impression damaging or fatal to the process. If, however, a statute requires the inclusion of all groups with a substantial interest as a condition of enforceability, parties otherwise disposed to excluding weaker parties will be required by law to include them.

This is but one example of how statutes can help relieve the mediator from the onus of raising troublesome questions which might be interpreted as advocacy of another group's

Unlike adjudication, legislation can do more than merely choose between competing interests on a case by case basis. Nor are legislatures limited, as are the courts, by restrictive procedures. Specifically, legislatures have the flexibility to structure and fund services needed to make mediation work, and work fairly.[5]

The alternative advocated by Professor Burns is to let the courts sort out the problems, standards, and remedies in the common law fashion. Waiting for a body of case law doctrine to develop strikes me as eminently undesirable. In this relatively new field, counsel often will be unready to offer courts the guidance, alternatives, and justifications needed for fully reasoned choice. Judges will vary enormously in their conversancy with mediation and will often know less about its potential and problems than legislative committees acting upon the recommendations of experts. (The procedures used to formulate the Uniform Commercial Code might serve as a model.) Meanwhile, mediators, lawyers, and perplexed parties will be forced to operate in a state of uncertainty while the common law slowly unfolds.[6] Judges' opinions will almost certainly provoke as much confusion as clarity while the courts slowly create standards.[7]

In this emerging area of law, we ought to acknowledge that the courts are severely limited in their ability to fashion coherent and comprehensive new doctrine. Only the legislatures are equipped to analyze and synthesize the diversity of concerns and viewpoints which exist regarding mediation. In this new area of the law, we need the certainty which only statutory laws can provide.

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claims. Such statutes might also enable the mediator to focus upon facilitating negotiations as well as sparing the mediator the duty of instructing the parties.

5. For example, the legislature might enact legislation requiring the state to supply legal counsel to mediation participants who have significant legal problems which would affect the fairness of a mediated agreement.

6. Those of us familiar with the problems of preemption in labor relations law have been waiting for the definitive answers from the courts since the late 1940s. The Supreme Court has repeatedly issued utterances on the subject which sometimes appear to settle matters, only to have later opinions unsettle them. Those who seek definitive answers from the courts often find themselves waiting for Godot.

7. This predilection for the common law over statute tells us something about some shortcomings of legal education. Law school preoccupation with what the courts do obscures for students, our present and future lawyers, the fact that most law is made by legislators and administrators, with only occasional intervention by the courts.